



August 3, 2001

Ms. Cathy Bradford  
Open Records Coordinator  
Texas Parks & Wildlife  
4200 Smith School Road  
Austin, Texas 78744-3291

OR2001-3376

Dear Ms. Bradford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150305.

The Parks and Wildlife Department (the "department") received a request for all documents in the possession of the department regarding Reliant Utility's Allen's Creek Project. You inform us that you are making some of the responsive information available to the requestor, but claim that a portion of the requested information is excepted from disclosure under sections 552.101,<sup>1</sup> 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we note that section 552.022(a) of the Government Code provides in pertinent part:

Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body.

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<sup>1</sup>Although you argue that information is protected under the attorney-client privilege pursuant to section 552.101 of the Government Code, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," the attorney-client privilege is recognized under section 552.107. Thus, we address your attorney-client privilege argument under section 552.107.

Gov't Code § 552.022(a)(3) (emphasis added). A portion of the information you have submitted to this office appears to be subject to section 552.022(a)(3) and therefore, as prescribed by section 552.022, this information, consisting of a contract which we have marked, must be released to the requestor unless it is expressly made confidential under other law, or unless it has not been signed.

You argue that the information subject to section 552.022(a)(3) is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 is a discretionary exception and not "other law" that makes information "expressly confidential" for purposes of section 552.022.<sup>2</sup> Therefore, assuming the contract at issue has been signed, you may not withhold it under section 552.111. If it has not been signed, we address your argument for it and the remainder of the information under section 552.111.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. Where a document is a genuine preliminary draft that has been released or is intended for release in final form, the draft necessarily represents the advice, opinion, and recommendation of the drafter; release would reveal something of the deliberative process by indicating where additions and deletions were made. Therefore, the draft itself, including comments, underlining, deletions, and proofreading marks are excepted by section 552.111, but not purely factual matters that are severable. When such factual matter is contained in the released final product, however, there is no need to release it from the draft. Open Records Decision No. 559 (1990). In the case of interagency communications, section 552.111 is not demonstrated to apply unless the agencies between which the

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990).

Upon review of the information you seek to withhold under section 552.111, we conclude that the information in Exhibits B-1 and B-2 may be withheld in its entirety as draft documents. A portion of the information in Exhibits B-3 and B-4, which we have marked, may be withheld under section 552.111.

You also argue that the information in Exhibit B-4 is excepted under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. As section 552.111 generally protects only advice, opinion, and recommendations, any protection under section 552.111 will usually be no greater or less than the protection offered under section 552.107. *See* Open Records Decision No. 574 at 2 (1990). Upon review of the information in Exhibit B-4, we conclude that a portion of it may be withheld under section 552.107(1).

To summarize, the contract in Exhibit B-3, which we have marked, must be released under section 552.022(a)(3), unless it has not been signed. If it has not been signed, it is excepted under section 552.111 as a draft document. The information in Exhibits B-1 and B-2 may also be withheld in its entirety under section 552.111 as draft documents. A portion of the information in Exhibits B-3 and B-4, which we have marked, may be withheld under section 552.111. Another portion of information, which we have marked, may be withheld from Exhibit B-4 under section 552.107(1). The remaining unmarked information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Pearle". The signature is fluid and cursive, with the first name "Michael" and last name "Pearle" clearly distinguishable.

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 150305

Enc. Submitted documents

c: Mr. Lucius Lomax  
P.O. Box 547  
Austin, Texas 78767  
(w/o enclosures)